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SUPREME COURT, U. S.

No. 143

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Supreme Court of the United States

OCTOBER TERM, 1965

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MEMORANDUM OF APPELLANTS IN RESPONSE TO SUGGESTIONS OF MOOTNESS AND IN OPPOSITION TO MOTIONS TO AFFIRM

HUGH B. COX
WILLIAM H. ALLEN
Covington & Burling
701 Union Trust Building
Washington, D. C. 20005
Attorneys for Appellants

March 1966

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Appellants The Baltimore and Ohio Railroad Company, *et al.*, hereby respond to the memoranda suggesting mootness filed by appellees The Atchison, Topeka and Santa Fe Railway Company, *et al.*, and the Southern Pacific Company, *et al.*, and to the motions to affirm filed by the appellees the State of California, *et al.*, and the regulatory commissions of the States of

Arizona, *et al.*, insofar as they are directed to this case. Appellants agree with the railroad appellees that this case is moot and should be disposed of in substantially the manner they suggest; for the same reason they oppose the motions to affirm filed by the public bodies.

I. THE SUGGESTIONS OF MOOTNESS

As set forth at page D-4 of the Santa Fe's memorandum suggesting mootness, the order of the Interstate Commerce Commission of January 7, 1966, vacating to the extent therein provided its earlier orders prescribing primary divisions of joint interterritorial rates between points in Official (or Eastern) territory and points in Mountain-Pacific territory, excepted from such vacation so much of such earlier orders as prescribed primary divisions "(a) to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, ..."

Subsequent to the filing of the memoranda suggesting mootness the appellants became parties to an agreement with Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in accordance with which the parties have jointly petitioned the Commission to modify its said order of January 7, 1966, by deleting therefrom the exception clause quoted above.

A copy of the petition with said agreement attached is reproduced as Appendix A hereto.

As a consequence of the agreements described in and attached to the Santa Fe's memorandum suggesting mootness and the agreement of February 28, 1966, with Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the action of the Commission taken and prayed to be taken in respect thereto, there remains

no outstanding controversy whatever concerning primary East-West divisions. Consequently, the appeal of these appellants from that part of the judgment of the District Court directed to portions of the orders of the Interstate Commerce Commission prescribing primary divisions of joint rates between points in Official (or Eastern) territory and points in Mountain-Pacific territory, has become moot.

II. THE MOTIONS TO AFFIRM

The motions to affirm filed by intervening plaintiffs-appellees the State of California, *et al.*, and the regulatory commissions of the States of Arizona, *et al.*, run to this case, No. 143, as well as to the related appeals in Nos. 159 and 576. The motions, however, recognize the settlements that have rendered this case moot. (Calif. Motion p. 4; Ariz. Motion p. 3).

Appellants submit that since this appeal has become moot the established practice of this Court, as expounded in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), does not warrant affirmance of the judgment of the court below, insofar as it was challenged by these appellants, but instead calls for reversal or vacation of the judgment and for remand to the District Court with directions to dismiss the complaints insofar as they were addressed to the Commission's prescription of primary East-West divisions.*

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* Since the appeal of the United States and the Interstate Commerce Commission in No. 576 challenges the judgment below in its entirety, it has become partially moot as stated in the railroad appellees' suggestions of mootness, and consequently the order of reversal or vacation should be entered in No. 576 as well as in this case.

WHEREFORE, it is requested that this Court enter an order in this case and in No. 576 reversing or vacating the judgment of the District Court and remanding the case to that court, with directions to dismiss the complaints as moot, insofar as the judgment below and the complaints are directed to portions of the orders of the Interstate Commerce Commission prescribing primary divisions of joint all-rail interstate rates for the transportation of property between points in Official (or Eastern) territory, on the one hand, and on the other points in Mountain-Pacific territory.

Respectfully submitted,

A. C. ARMSTRONG
ROBERT D. BROOKS
J. T. CLARK
ROBERT B. CLAYTOR
K. A. DOBBINS
J. W. GRADY
THOMAS P. HACKETT
ALLEN LESLEY
R. J. MULHERN
Of Counsel

HUGH B. COX
WILLIAM H. ALLEN
Covington & Burling
701 Union Trust Building
Washington, D. C. 20005

GORDON JOHNSON
JAMES W. BALDWIN
Thelen, Marrin, Johnson
& Bridges
811 W. Seventh Street
Los Angeles, Calif. 90017

EDWARD A. KAIER
1100 Six Penn Center Plaza
Philadelphia, Pa. 19103

JOSEPH F. ESHELMAN
1600 Three Penn Center Plaza
Philadelphia, Pa. 19102

KENNETH H. LUNDMARK
466 Lexington Ave.
New York, New York 10017
Attorneys for Appellants

March 1966

APPENDIX A

BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. 31503 and Sub Nos.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

Petition for Modification of Order

Come now Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called "Milwaukee," and the Eastern railroads complainants in Docket No. 31503, and respectfully state as follows:

I.

The Commission, by its order dated January 7, 1966, served January 17, 1966, vacated its earlier reports and orders of March 21, 1963 (as clarified by order of June 20, 1963) and December 31, 1963

> "insofar as those orders prescribe primary divisions of joint all-rail interstate rates for the transportation of property between points in official (or eastern) territory, on the one hand, and on the other, points in mountain-Pacific territory, as provided in appendices B and B-1 to the said reports of the Commission accompanying said orders to the extent that such joint rates apply from and to points on the lines of the petitioning eastern railroads named in revised appendix I and in addition the Chicago & Eastern Illinois Railroad Company, and points on the lines of petitioning western railroads named in revised appendix II, except (1) insofar as said orders prescribe

divisions of joint rates (a) to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, . . ."

II.

The Milwaukee and the Eastern railroads have now entered into an agreement dated February 28, 1966, similar to the agreement dated September 29, 1965, between the Eastern railroads and Western railroads, which latter agreement is referred to in said order of January 7, 1966. Under the agreement of February 28, 1966, the Milwaukee and the Eastern railroads have agreed upon the same primary divisions of joint all-rail interstate rates for the transportation of property between points in Official (or Eastern) territory, on the one hand, and points in Mountain-Pacific territory, including stations on the Milwaukee, on which the Milwaukee performs service within Mountain-Pacific territory as an originating, terminating, or intermediate carrier, on the other hand. A copy of said agreement is hereto attached as Exhibit "A".

III.

Exception clause (1)(a) in said order of January 7, 1966, although properly included therein when the order was issued, should now be deleted in view of the aforesaid agreement of February 28, 1966.

IV.

Petitioners do not intend, by this petition, directly or indirectly, to affect the subdivisions accruing to the Midwestern lines (including the Milwaukee) as provided in Appendices C (d) and C-1 (d) of the Reports and Orders of this Commission of March 21, 1963 (as clarified by order of June 20, 1963) and December 31, 1963.

WHEREFORE, petitioners pray that the order of the Commission herein dated January 7, 1966, be modified by the

deletion therefrom of the exception clause (1) (a) above quoted.

Respectfully submitted,

A. C. Armstrong
Robert D. Brooks
J. T. Clark
Robert B. Claytor
Kemper A. Dobbins
J. W. Grady
Edward A. Kaier
Allen Lesley
K. H. Lundmark
Joseph F. Eshelman
Sixteenth Floor Three Penn Center Plaza
Philadelphia, Pennsylvania 19102
Attorneys for Eastern Railroads

Raymond K. Merrill
888 Union Station Building
Chicago, Illinois 60606
Attorney for Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dated: March 1, 1966

EXHIBIT "A"

THIS AGREEMENT, made this 28th day of February, 1966, by and between Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as "Milwaukee," and the Eastern railroads in Official territory, as named in Appendix 1 hereof, hereinafter referred to as "Eastern railroads,"

WITNESSETH:

WHEREAS, by an agreement dated September 29, 1965, the Eastern and Western railroads parties thereto undertook (so far as they could do so as among themselves) to compromise, settle, and dispose of the litigation before the Interstate Commerce Commission and the courts involving the Docket 31503 proceedings described therein and certain related disputes;

WHEREAS, by agreement dated November 19, 1965, the Chicago & Eastern Illinois Railroad Company and the Mountain-Pacific railroads plaintiffs and intervening plaintiffs in Civil Action 63-745 EC, S.D. Calif., adopted with certain exceptions the provisions of the agreement of September 29, 1965;

AND WHEREAS, Milwaukee was not a party to the said agreement of September 29, 1965, or the said agreement of November 19, 1965, but is willing, insofar as it performs service in Mountain-Pacific territory, to accept the obligations and obtain the benefits of said agreements to the extent hereinafter set forth;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

Section A. The Milwaukee, as to traffic on which it performs originating, terminating, or intermediate service in Mountain-Pacific territory, and Eastern railroads, insofar as they perform service within Official territory, adopt the provisions of Sections 1 through 6 of the agreement of September 29, 1965, and will apply as provided therein the

bases of primary divisions specified therein and in Section A of the agreement of November 19, 1965, to joint rates on such traffic between stations in Mountain-Pacific territory, on the one hand, and stations on the lines of Eastern railroads in Official territory, on the other hand.

Section B. The Milwaukee will become a party to joint divisions sheets with Eastern railroads in such manner and to such extent as will carry out the provisions and purposes of this agreement.

Section C. The parties will join in informing the Commission of this settlement and in petitioning it for an appropriate amendment of its order of January 7, 1966, so as not to except from the vacation therein ordered the prescribed divisions of joint rates "to or from stations in mountain-Pacific territory on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company."

IN WITNESS WHEREOF, this agreement has been executed as of the 28th day of February, 1966.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

By .....
W. W. Kremer
Vice President—Traffic

EASTERN RAILROADS named in Appendix 1 hereof

By .....
Charles S. Baxter
Their Agent in This Behalf

APPENDIX 1

Eastern Railroads

The Akron, Canton & Youngstown Railroad Company
Algers, Winslow and Western Railway Company
The Ann Arbor Railroad Company
Arcade and Attica Railroad Corporation
Aroostock Valley Railroad Company
Atlantic Coast Line Railroad Company
The Baltimore and Annapolis Railroad Company
Baltimore and Eastern Railroad Company
The Baltimore and Ohio Railroad Company
Bangor and Aroostock Railroad Company
Bath and Hammondsport Railroad Company
Beech Mountain Railroad Company
Belfast and Moosehead Lake Railroad Company
Bellefonte Central Railroad Company
Bessemer and Lake Erie Railroad Company
Boston and Maine Corporation
Boyne City Railroad Company
Brooklyn Eastern District Terminal
Bush Terminal Railroad Co.
Cadillac & Lake City Railway Company, Inc.
Cambria and Indiana Railroad Company
Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof)
Canadian Pacific Railway Company (Stations in Maine and Vermont)
Central Indiana Railway Company
The Central Railroad Company of New Jersey
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago South Shore and South Bend Railroad
The Cincinnati, New Orleans and Texas Pacific Railway Company
Claremont and Concord Railway Company, Inc.
The Clarendon and Pittsford Railroad Company
Coudersport & Port Allegany Railroad Company
The Dansville and Mount Morris Railroad Company

The Delaware & Hudson Railroad Corporation
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
East Jersey Railroad and Terminal Company
East Washington Railway Company
Erie-Lackawanna Railroad Company
Ferdinand Railroad Company
Fonda, Johnstown and Gloversville Railroad Company
Fore River Railroad Corporation
Genesee and Wyoming Railroad Company
The Grafton and Upton Railroad Company
Grand Trunk Railway System (Lines in the United States, East of the West Bank of the Detroit and St. Clair Rivers), comprising the following carriers:
  Canadian National Railway Company
  Grand Trunk Western Railroad Company
Green Mountain Railroad Corporation
Greenwich & Johnsonville Railway Company
Hoboken Shore Railroad
Hoosac Tunnel and Wilmington Railroad Company
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
The Ironton Railroad Company (Lehigh Valley Railroad Company and Reading Company, Lessees)
The Kanawha Central Railway Company
Lackawanna and Wyoming Valley Railway Company
Lake Erie, Franklin & Clarion Railroad Company
The Lehigh and Hudson River Railway Company
Lehigh and New England Railway Company
Lehigh Valley Railroad Company
Livonia, Avon & Lakeville Railroad Corporation
The Long Island Rail Road Company
The Lorain & West Virginia Railway Company
Louisville and Nashville Railroad Company
The Lowville and Beaver River Railroad Company
Ludington and Northern Railway Co.
Maine Central Railroad Company
Maryland and Pennsylvania Railroad Company
Middle Fork Railroad Company
Middletown and New Jersey Railway Company Inc.
Midway Railroad Company
Monon Railroad
The Monongahela Railway Company

Montour Railroad Company
Montpelier and Barre Railroad Company
Morehead and North Fork Railroad Company
Morristown & Erie Railroad Company
Moshassuck Valley Railroad Company
Mount Hope Mineral Railroad Company
The Narragansett Pier Railroad Co. Inc.
The New Jersey and New York Railroad Company
The New Jersey, Indiana & Illinois Railroad Company
The New York and Long Branch Railroad Company
The New York Central Railroad Company
The New York Connecting Rail Road Company
New York Dock Railway
The New York, New Haven and Hartford Railroad Company (Richard Joyce Smith, William J. Kirk and Harry W. Dorigan, Trustees)
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway Company
Norfolk, Franklin and Danville Railway Company
Norfolk Southern Railway Company
Northampton and Bath Railroad Company
Norwood & St. Lawrence Railroad Company
Pennsylvania and Atlantic Railroad Co.
The Union Transportation Co., Lessees
The Pennsylvania Railroad Company
Pennsylvania-Reading Seashore Lines
The Pittsburgh and Lake Erie Railroad Company
The Pittsburg & Shawmut Railroad Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Port Huron and Detroit Railroad Company
Quebec Central Railway Company
Rahway Valley Company
Raritan River Rail Road Company
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
Rosslyn Connecting Railroad Company
St. Johnsbury and Lamoille County Railroad
Seaboard Air Line Railroad Company
Skaneateles Short Line Railroad Corporation
South Brooklyn Railway Company
Southern Indiana Railway, Inc.
Southern New York Railway Incorporated
Southern Railway Company

Springfield Terminal Railway Company
The Staten Island Rapid Transit Railway Company
Stewartstown Railroad Company
The Toledo, Angola & Western Railway Company
Toledo, Peoria & Western Railroad Company
Trenton-Princeton Traction Company
Twin Branch Railroad Company
Vermont Railway, Inc.
Virginia Blue Ridge Railway
Virginia Central Railway
Wabash Railroad Company (To the extent of its interest therein)
Warwick Railway
Washington and Old Dominion Railroad
Waynesburg and Washington Railroad Company
Wellsville, Addison & Galeton Railroad Corporation
Western Allegheny Railroad Company
Western Maryland Railway Company
West Pittston-Exeter Railroad Company
West Virginia Northern Railroad Company
Wharton and Northern Railroad Company
Winchester and Western Railroad Company
The Winfield Railroad Company
Winifrede Railroad Company
Youngstown & Southern Railway Company

END